No. 92-1812

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

PEDRO ALVAREZ-SANCHEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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1. The dispositive threshold question in this case is whether an arrest on state-law charges and the ensuing custody by state officers is an "arrest or other detention" under 18 U.S.C. 3501(c). Respondent's arguments on that threshold question fail to cast any doubt on the correctness of our analysis.

a. Respondent's principal textual argument (Br. 16-17) is that Section 3501(c)'s reference to "any" law enforcement officer is broad enough to encompass the conduct of state officers. We have never claimed, however, that arrests by state officers cannot be "arrest[s]" under Section 3501(c). Our submission is that the "arrest or other detention" of which Section 3501(c) speaks must be for a violation of federal law, regardless of whether federal or state officers effect the arrest. Thus, if a police

officer discovers in the course of a routine traffic stop that the motorist has an outstanding federal arrest warrant, his decision to execute that warrant gives rise to an "arrest" under Section 3501(c). If, on the other hand, the officer arrests the motorist for a state traffic offense, the arrest is not an arrest that triggers Section 3501(c).

The text of Section 3501(c) makes clear that the "arrest or other detention" must be for a violation of federal law. The first sentence of Section 3501(c) addresses the "delay" between the defendant's arrest and the time he is taken "before a magistrate * * * empowered to commit persons charged with offenses against the laws of the United States"—*i.e.*, a magistrate authorized to grant or deny bail for federal offenses. That focus is confirmed by the proviso that immediately follows, which extends the six-hour safe harbor provided by the first sentence in cases in which a delay reasonably results from the unavailability of "such magistrate." But there can be no "delay" in taking a person who has been arrested for a state crime before a federal magistrate, because such state arrests do not trigger federal presentment obligations.[1]

[1] It is unclear what respondent means when he argues (Br. 16) that the statute's reference to "any law enforcement officer" must be "contrast[ed]" with its reference to judicial officers "empowered to commit persons charged" with federal crimes. If he means to suggest merely that actions by state officers can sometimes trigger the operation of Section 3501(c)—when state officers take it upon themselves to arrest a person for a violation of federal law—he makes a narrow point that we have never disputed. If, however, he means to suggest that arrests by "any" law enforcement officer always trigger Section 3501(c), respondent's argument would have the bizarre effect of requiring state officers to present violators of local law to federal magistrates having no jurisdiction over those violations. The two phrases that respondent would "contrast" are part of a single continuous sentence, the natural reading of which is that the arrests or detentions must be for "offenses against the laws of the United States," regardless of which law enforcement officers make the arrests.

Moreover, nothing in the statute supports respondent's claim (Br. 17-18) that all arrests must be deemed to trigger Section 3501(c) whenever the defendant is eventually charged with a federal crime. If an arrest for a state-law offense does not create an immediate obligation to take the defendant to a federal magistrate—and is therefore not an "arrest" under Section 3501(c)—later events cannot retroactively transform the exercise of state authority into a federal arrest, so that all the time that elapsed after the State's action is suddenly transformed into impermissible "delay." Section 3501(c) contains no hint that the question whether arrests fall within its ambit turns on the outcome of subsequent charging decisions, much less that "delay" will be deemed to arise by operation of law well after nothing can be done to prevent it. The anomaly of such a retroactive transformation of custody from state to federal is particularly apparent when coupled with respondent's further claim (Br. 26-27) that any statements obtained during state custody—*i.e.*, during the period that later events transform into impermissible "delay"—must be suppressed as a sanction for the government's misconduct in failing to present the defendant to a federal magistrate within six hours of his state arrest.

b. Like the statutory text, the history of Section 3501 gives no support to respondent's proposed construction of the statute. We do not, as respondent claims, urge "as a principle of statutory construction" the proposition that all defendants must lose claims under Section 3501

because "Congress was in an 'anti-defendant' mood when it considered and passed the statute." Br. 20-21. Our point is that it is anomalous to hold that Section 3501 is *broader* than the *McNabb-Mallory* rule, which Congress intended to eliminate by passing that statute.[2] Even the *McNabb-Mallory* rule did not require suppression of a confession made by a defendant while in state custody unless he demonstrated that state and federal officers colluded to use state custody to deprive him of his right to a speedy federal presentment. See, *e.g.*, *United States* v. *Coppola*, 281 F.2d 340, 344 (2d Cir. 1960) (en banc), aff'd, 365 U.S. 762 (1961).

Respondent attempts to avoid that anomaly by claiming that this Court's decisions in *Anderson* v. *United States*, 318 U.S. 350 (1943), and *Coppola* v. *United States*, 365 U.S. 762 (1961), never established a requirement of a collusive "working arrangement,"[3] and he cites a number

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[2] Citing two statements made during the Senate debate (Br. 23), respondent contends in passing that the legislative history supports the result reached by the court of appeals. The first of those statements supports our submission that the arrest must be for a violation of federal law. That statement describes a scenario in which a "sheriff picks up a man under the Dyer Act" for transporting a stolen car across state lines. The Dyer Act, 18 U.S.C. 2311 *et seq.*, is a federal statute that proscribes the interstate transportation of stolen property, and an arrest "under" that act would necessarily be an arrest for a violation of federal law. The second statement, which notes that the arresting officer may need to check "with officers in another State," does not bear at all on the nature of the charges for which the arrest is effected. The federal government has law enforcement officers in every State of the Union. And it is not at all uncommon for a defendant to be arrested in one State on the basis of an arrest warrant issued by a federal district court sitting in another State.

[3] Respondent seeks to distinguish *Anderson* on the ground that a "working arrangement" merely happened to be present in that

of cases to support to that claim. Yet the cases he cites actually refute his argument. For example, in *Barnett* v. *United States*, 384 F.2d 848 (5th Cir. 1967), the court emphasized that in order to bring the *McNabb-Mallory* rule "into play there must be detention 'by or at the instance of federal officers,'" and that therefore "[t]he necessary inquiry is whether the cooperation between state and federal officials had *as its purpose* * * * to permit in-custody investigation and interrogation by federal officials without compliance with Rule 5(a)." *Id.* at 857, 858 (emphasis added) (quoting *White* v. *United States*, 200 F.2d 509, 513 (5th Cir. 1952)). And in *Burke* v. *United States*, 328 F.2d 399, 403 (1st Cir.), cert. denied, 379 U.S. 849 (1964), the court noted that the defendant

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case. Br. 21. *Anderson*, however, made clear that the existence of the collusive arrangement was the ground on which reversal of the judgment was based; for it was that "working arrangement between the federal officers and the sheriff of Polk County *which made possible the abuses*" found by the Court. 318 U.S. at 356 (emphasis added).

Respondent's attempt to distinguish *Coppola* as a case in which the defendant had been arraigned on state charges likewise fails. In *Coppola*, the FBI alerted state authorities to the fact that Coppola had committed a state offense, furnished them with photographs of Coppola and his two confederates, and told them where Coppola could be found. 281 F.2d at 342. After the state authorities arrested Coppola, they promptly informed the FBI of the arrest. The FBI then interrogated Coppola at length *before* any state charges were ever filed or Coppola was arraigned on them. *Ibid.* It was conceded that the interrogation in that case took place while the defendant's custody was illegal under New York law by reason of the failure of state authorities to arraign him promptly. *Id.* at 341 n.1. The court of appeals nonetheless concluded that "whether a detention is illegal under state law has no bearing upon the propriety of receiving admissions in evidence in a federal criminal proceeding." *Ibid.* This Court summarily affirmed.

had not been "arrested by the Boston police solely for the federal authorities." Accordingly, the fact that the Boston police informed federal postal inspectors of the arrest, and the "subsequent visit [of a postal inspector] to Boston Police Headquarters to question [the defendant] did not make [the defendant] a federal prisoner and bring him under the protection of Rule 5(a)." *Ibid.* (citing *Coppola*). Other cases cited by respondent are to the same effect.[4]

c. In this case, there was plainly no "working arrangement" of the type required by *Anderson* and *Coppola*—*i.e.*, an agreement to execute an arrest in order to evade Rule 5(a), see *Coppola*, 281 F.2d at 344—because

[4] For example, *Cram* v. *United States*, 316 F.2d 542 (10th Cir. 1963), cited by respondent for the proposition that *McNabb-Mallory* required suppression unless a state arrestee was arraigned on the state charges (Br. 22), in fact considered and specifically *rejected* that proposition in dictum. *Id.* at 544. Accord *Barnett* v. *United States*, 384 F.2d at 856 (violation of state arraignment requirement does not require suppression of statement made to federal officers). Instead, citing *Coppola*, the *Cram* court upheld the admission of the confession, explaining that there was "no evidence here of any collaboration or working agreement between the state and federal authorities relating to the arrest and the detention of [the defendant], *and such an arrangement must be shown in order to invoke the rule of the Anderson case.*" 316 F.2d at 544-545 (emphasis added).

In *United States* v. *Hindmarsh*, 389 F.2d 137 (6th Cir.), cert. denied, 393 U.S. 866 (1968), also cited by respondent (Br. 22), the court likewise upheld admission of the confession based on the very standard that respondent contends was not the law prior to the enactment of Section 3501. As the court noted, "[t]he prime factor distinguishing *Coppola* and this case from *Anderson* is that the detention by state officers was not *for the purpose of aiding and abetting the federal officers* in carrying on interrogation of the suspect in violation of Federal Rule 5(a)." 389 F.2d at 146 (emphasis in original).

federal agents did not even learn of respondent's existence until Monday morning, and thus they could not have solicited or procured respondent's arrest on Friday or his Friday-to-Monday custody. The district court therefore properly concluded that there was "no evidence" that "a collusive arrangement between state and federal agents * * * caused the confession to be made." Pet. App. 50a. Indeed, while respondent suggested at the petition stage the possibility that there was a "working arrangement" between the state and federal authorities, he no longer pursues that claim.

Respondent now appears to claim instead that the arrest was federal from the outset, because the state officers subjectively intended to enforce only federal law and had no intention to pursue state charges. Br. 18. For that reason, he claims that the Court need not decide how to treat state custody when state officers are "enforcing their own laws." *Ibid.* When we sought review, however, we made clear that the state officers began by obtaining a warrant to search respondent's residence for evidence of narcotics activity "constituting a felony under California law," and that respondent was arrested by the state officers when the search in fact turned up such evidence. Pet. 3. In his brief in opposition, respondent specifically agreed with our statement of the facts, adding only that the arrest and ensuing custody were *also* based on the state officers' desire to "consider[] *state* charges against [respondent] involving the counterfeit currency." Br. in Opp. 1-2 (emphasis added). In light of his concessions at the petition stage, respondent may not now claim for the first time that the state officers were not enforcing their own laws at all.

See, *e.g.*, *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 815-816 (1985).[5]

2. a. Under Section 3501(a), a confession must be admitted if the district court finds it voluntary. Respondent no longer disputes the voluntariness of his confession.[6] Instead, he contends that, notwithstanding Section 3501(a), the "plain language" of Section 3501(c) requires the suppression of any confession made more than six hours after arrest, because Section 3501(c) "determines when confessions will be 'inadmissible solely because of delay.'" Br. 6 (emphasis omitted). Respondent, however, omits the key language of the statute: Section 3501(c) does not establish a rule for suppression, but instead determines when confessions "shall *not* be inadmissible solely because of delay." 18 U.S.C. 3501(c) (emphasis added). Section 3501(c) thus provides law enforcement officers with a safe harbor by prohibiting suppression on grounds of delay when a confession is made within six hours of arrest. It says nothing at all about the admissibility of confessions made after that six-hour period. The admissibility of confessions made outside the six-hour safe harbor period is left to other provisions and principles of law, including Section 3501(a), which provides that a voluntary confession "shall be admitted."[7]

[5] Respondent urges this Court to find that the California officers effected a federal arrest solely on the ground that the officers "knew of the federal offense from the beginning and showed deference to federal interests," as shown by the fact that they notified the Secret Service of the discovery of counterfeit currency and later permitted the Secret Service agents to question and arrest respondent. Br. 18. But state officers do not act as federal agents whenever they are aware that a defendant may be guilty of a federal crime, or when they simply provide information to their federal counterparts. As this Court has repeatedly recognized in various contexts, such cooperation as the record discloses here "is the conventional practice between the two sets of prosecutors throughout the country" and it does not establish that state authorities acted as a cat's paw for the federal government. *Bartkus* v. *Illinois*, 359 U.S. 121, 123 (1959). See also *Abel* v. *United States*, 362 U.S. 217, 229-230 (1960); *United States* v. *Coppola*, 281 F.2d at 345.

[6] Respondent contended at the petition stage that certiorari should be denied because the court of appeals indicated in a footnote to its opinion that it would find his confession involuntary if it confronted the question. Br. in Opp. 11-12. We pointed out in our reply brief at the petition stage that the Ninth Circuit's suggestion to that effect was based on a "balancing" of policy considerations against free will factors, and that such balancing was legally erroneous. Reply Br. 5 n.2. Respondent's brief on the merits makes no claim that his confession was involuntary under the correct legal standard.

[7] Respondent also suggests (Br. 7-8) that our reading of Section 3501(c) fails to give effect to every word of that section. He notes that Section 3501(c) conditions the availability of the safe harbor on (1) a delay that does not exceed six hours, and (2) the voluntariness of the confession. Respondent argues that "[i]f Section 3501(a) is construed to override Section 3501(c), the only requirement for admission of *any* confession" will be voluntariness, thus rendering the six-hour provision "meaningless." Br. 7. We agree that the sole test for admissibility is voluntariness, but we do not see how that test renders Section 3501(c) "meaningless." The six-hour provision is a safe harbor. The point of a safe-harbor provision—here as elsewhere in the law—is not to change the legal principles that govern a claim, but to provide certainty with respect to specific recurring factual situations. Thus, Congress provided that the sole test for the admissibility of confessions is voluntariness, 18 U.S.C. 3501(a), and that in assessing voluntariness a court may consider a delay in presentment among other factors, 18 U.S.C. 3501(b). Because Congress believed that interrogation was a desirable investigative technique, it provided that a six-hour delay for that purpose could not be deemed to render a confession inadmissible if the confession was otherwise voluntary. 18 U.S.C. 3501(c); see 114 Cong. Rec. 14,184 (1968) (remarks of Sen. McClellan).

b. The linchpin of respondent's claim that Section 3501(c) authorizes suppression based on delay is the proposition that the legislative history of that statute shows that it was intended to codify the *McNabb-Mallory* rule for any delay exceeding six hours. Br. 14-15. Respondent cites no statement by any legislator suggesting that a codification of *McNabb-Mallory* was intended. To the contrary, as respondent acknowledges (Br. 9, 13), the Senate Judiciary Committee and numerous Senators and Representatives stated that Section 3501 would *overrule* the *McNabb-Mallory* doctrine. Respondent merely asserts that the Senators who advocated overruling *McNabb-Mallory* abandoned that objective and reached, as a "compromise," precisely the opposite result.

Respondent does not base that implausible conclusion on any floor statement that adverted to a "compromise."[8] Respondent argues instead that, in light of the controversial nature of the bill, the Senate's addition of the six-

[8] To the contrary, Senator Scott's description of the six-hour provision as a "very simple amendment" to which he had "heard of no objection," 114 Cong. Rec. 14,184 (1968), indicates that he did not perceive the change he was proposing as one that would alter the essential character of the bill. Senator Scott went on to explain that his proposal was intended to forestall a successful attack on the constitutionality of Section 3501(c), since he thought the statute would be of "doubtful validity" if it were applied to forbid suppression of a confession obtained after "a 36- or a 24-hour interrogation." 114 Cong. Rec. 14,185-14,186 (1968). The *McNabb-Mallory* doctrine, of course, had no constitutional underpinning. See S. Rep. No. 1097, 90th Cong., 2d Sess. 40 (1968). Senator Scott's explanation of his amendment therefore makes clear that he sought the change only because he envisioned some situations in which a lengthy delay used for interrogation would render a confession involuntary, and he did not think Section 3501(c) should bar suppression in those circumstances.

hour provision to Section 3501(c) must be taken to reflect an intention to retain *McNabb-Mallory*. Br. 9-10. Respondent supports that claim by citing a few floor statements that referred to the six-hour period as a limit on the time during which interrogation could take place. Br. 12-13 & n.7. As respondent acknowledges, however, several of the floor statements he cites also expressly recognized that the bill would "obviously * * * repeal" or "overrul[e]" *Mallory*. Br. 13 & n.7. At most, those statements merely evince an intention—consistent with the creation of a safe-harbor period—that delays for interrogation should not last more than six hours. They do not speak at all to what, if any, consequences a longer delay would have for admissibility.

c. As we noted in our opening brief (Br. 36-38), the court of appeals erred even if the broadest form of the *McNabb-Mallory* rule remains the law, because the court rested its decision to suppress solely on the Monday-to-Tuesday delay that *followed* the confession. That delay cannot be deemed "unnecessary" in light of the district court's finding (Pet. App. 49a) that the delay was caused by the need to prepare a complaint and by the unavailability of a magistrate. And, in any event, *United States* v. *Mitchell*, 322 U.S. 65 (1944), established that any time that elapses *after* a confession may not be used to justify its suppression under the *McNabb-Mallory* doctrine.

Respondent's principal response is that the court of appeals' emphasis on the *post*-confession delay should be understood (contrary to what the court actually said) as intended to highlight the effect of the *pre*-confession delay. Apart from that implausible characterization of the court of appeals' rationale, respondent asserts that the court of appeals acted properly because the purpose of the post-confession delay was to interrogate him and

that the delay was therefore indefensible. Yet a claim that the post-confession delay was unjustifiable, even if true, would not serve to distinguish this case from *Mitchell*—there is no suggestion in *Mitchell* that the eight-day delay that followed the confession in that case had any proper purpose.

Moreover, the record does not support respondent's assertion that the purpose of the delay in this case was to interrogate him. To be sure, the court of appeals so stated in passing. Pet. App. 21a. But the district court made specific factual findings to the contrary. With respect to the period of state custody that preceded the confession, the district court specifically found "no evidence" of that improper purpose; the district court further concluded that the delay was not "the result of oppressive police practices prior to obtaining the confession" and did not "otherwise cause[] the confession." Pet. App. 49a. With respect to the delay that followed the confession, the district court found that it was caused by the need to prepare a complaint and by the unavailability of the magistrate. *Id.* at 49a-50a. The court of appeals did not hold that those findings are clearly erroneous, and indeed it could not have reached that conclusion under the applicable standard of review. See, *e.g.*, *Amadeo* v. *Zant*, 486 U.S. 214, 225-226 (1988). Nor has respondent even attempted to challenge those findings here. Those findings are therefore conclusive on him.[9]

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[9] Respondent alternatively suggests that Section 3501 requires suppression of any confession made more than six hours after his state arrest, because the statute merely codifies the *McNabb-Mallory* doctrine, under which suppression was mandatory. Br. 26-27. That claim fails even on the dubious assumptions that state officers effected the relevant arrest and that Section 3501 codifies the *McNabb-Mallory* doctrine. Under the *McNabb-Mallory* rule, the defendant bore the burden of showing a violation of Rule 5(a)—*i.e.*, *unnecessary* delay. See, *e.g.*, *Barnett* v. *United States*, 384 F.2d at 859. A finding of unreasonableness required at least that, as in *Mallory*, a magistrate was available "in regular course." *United States* v. *Ladson*, 294 F.2d 535, 537 n.1 (2d Cir. 1961), cert. denied, 369 U.S. 824 (1962); *Porter* v. *United States*, 258 F.2d 685, 689 (D.C. Cir. 1958) (Reed, J.) (presentment required only "during the ordinary professional hours of commissioners and judges"), cert. denied, 360 U.S. 906 (1959). Respondent has never alleged, much less established, that a magistrate was available in the ordinary course during his weekend in custody. And, even if a magistrate had been available during that period, respondent would have to show as well that "the officers * * * delayed arraignment for the sole purpose of subjecting him to constant interrogation." *United States* v. *Price*, 345 F.2d 256, 261 (2d Cir.), cert. denied, 382 U.S. 949 (1965). As we have noted, the district court specifically found to the contrary.

3. Respondent devotes much of his brief (Br. 27-49) to the proposition that this Court should affirm the judgment below on the alternative ground that, by holding him in custody over the weekend, the state authorities violated the Fourth Amendment. He relies on *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991), which held that the Fourth Amendment's requirement of a prompt judicial determination of probable cause generally means that such a determination must be provided within 48 hours of a warrantless arrest. Because he was not presented to a magistrate within 48 hours of his Friday arrest, respondent contends that his confession on Monday morning was the fruit of an unlawful detention.

a. The Court did not grant certiorari to consider any Fourth Amendment issue. And, as respondent concedes (Br. 36-39), he never moved in the district court to suppress his statements on Fourth Amendment grounds, nor did he make any Fourth Amendment argument to the court of appeals. Accordingly, even if the Court elects to address respondent's Fourth Amendment claim, that

claim is cognizable only if it satisfies the "plain error" standard of Fed. R. Crim. P. 52(b).

An essential requirement for a finding of plain error is obviousness. See *United States* v. *Young*, 470 U.S. 1, 14-17 & n.14 (1985). The doctrine authorizes review of forfeited claims only when the trial was "infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States* v. *Frady*, 456 U.S. 152, 163 (1982); see also *United States* v. *Merlos*, 8 F.3d 48, 50-51 (D.C. Cir. 1993) (obviousness requirement not met when error only became "plain" with a Supreme Court ruling issued well after the trial). Here, respondent states that he could not have made the Fourth Amendment argument before 1991, when *McLaughlin* "worked a significant change in the law." Br. 38. But respondent cannot plausibly claim on the one hand that the prosecutor and trial judge were derelict in tolerating the alleged Fourth Amendment error, and on the other hand that he should not be expected to have made a Fourth Amendment claim under the law as it stood at the time of the trial. Moreover, respondent has failed to show that the claimed error was so grievous as to "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Olano*, 113 S. Ct. 1770, 1779-1781 (1993); 4 Wayne R. LaFave, *Search and Seizure* § 11.7(d), at 522 (2d ed. 1987). Therefore, even if the Court elects to address respondent's Fourth Amendment claim, it should be rejected on plain error grounds.

b. In any event, the record does not demonstrate any violation of respondent's Fourth Amendment rights. This Court held in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), that the Fourth Amendment requires a judicial determination of probable cause that a suspect has committed a

crime as a condition to any extended restraint of his liberty. 420 U.S. at 126-127. That determination must be made "either before or promptly after arrest," *id.* at 125, and it need not be a formal, adversarial proceeding where the defendant is accorded the right to counsel and the right to introduce evidence or confront witnesses against him, *id.* at 120-123. See also *Baker* v. *McCollan*, 443 U.S. 137, 143 (1979). Under *Gerstein*, the judicial officer is simply required to make the same judgment, under similar procedures, that he would make in deciding whether to authorize an arrest warrant; as the Court noted, 420 U.S. at 120, probable cause in that context "traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony."

In this case, Los Angeles County Detective John McCann sought and obtained a state search warrant a few hours before respondent's arrest. In support of that application, Detective McCann submitted a five-page affidavit, which detailed the evidence that respondent had sold heroin out of his apartment on numerous occasions.[10] The state judge issued a warrant to search both the apartment and respondent's person. In so doing he necessarily concluded that there was probable cause to believe that respondent was engaging in an ongoing pattern of heroin dealing. This is therefore not a case in which a police officer restrained the liberty of a suspect in the absence of any judicial assessment of the evidence

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[10] The search warrant and supporting affidavit (C.A. Excerpt of Record 49-55), which were submitted to the district court as an appendix to the Declaration of Detective John McCann (see Pet. App. 57a), are reprinted in the appendix to this brief. The C.A. Excerpt of Record may be found in Volume A of the record in this Court.

supporting that action. In the circumstances of this case, the state judge's decision to issue the search warrant necessarily incorporated a determination of probable cause sufficient to meet the requirements of *Gerstein*.

c. Even if respondent's Fourth Amendment rights were violated by the failure to seek a new determination of probable cause after his arrest, there would be no justification for suppressing his confession, because respondent has failed to show that the evidence he seeks to suppress is a "fruit" of the violation he claims.

The rule that evidence may not be suppressed unless it bears a sufficiently close causal connection to the claimed illegality reflects the Court's consistent refusal to use the suppression remedy to place the defendant in a better position than he would have occupied absent the illegality. As the Court recently explained:

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred. When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

Murray v. *United States*, 487 U.S. 533, 537 (1988) (quoting *Nix* v. *Williams*, 467 U.S. 431, 443 (1984)).

The Court's application of that principle in *New York* v. *Harris*, 495 U.S. 14 (1990), and *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990), is instructive here. In *Harris*, the Court held that a confession given at the stationhouse, following an arrest effected without the

warrant required by *Payton* v. *New York*, 445 U.S. 573 (1980), was not the "fruit" of the *Payton* violation. Because the arrest was supported by probable cause, the police "had a justification to question Harris prior to his arrest" and the confession accordingly could not be viewed as "the fruit of having been arrested in the home rather than someplace else." 495 U.S. at 19. In *Montalvo-Murillo*, the Court rejected the claim that a failure to provide a suspect with a detention hearing within the time limits prescribed by the Bail Reform Act of 1984 entitled him to immunity from pretrial detention. Citing *Harris*, the Court concluded that "a person does not become immune from detention because of a timing violation." 495 U.S. at 722. Since it was clear that the suspect would have been denied bail if the applicable time limits had been observed, "the noncompliance with the timing requirement had no substantial influence on the outcome of the proceeding" and no relief was warranted as a result of the violation. *Ibid.*

The analysis in those cases answers respondent's claim here. Respondent does not claim that he was arrested without probable cause. His sole Fourth Amendment claim under *Gerstein* and *McLaughlin* concerns the *timing* of the probable cause determination. But the fact that respondent did not obtain a probable cause determination by Sunday evening did not affect the ability of the government to obtain a statement from him on Monday morning. Like the place of Harris's arrest or the timing of Montalvo-Murillo's bail hearing, the timing of respondent's *Gerstein* determination would have had no effect on his custody unless there was no probable cause to hold him. Because there was ample probable cause to believe respondent guilty of heroin trafficking, his statement must be viewed as the result of the proper

custody in which he was held by virtue of that probable cause—not as the fruit of a *Gerstein* timing violation.

d. Finally, the record reflects that in failing to present respondent to a magistrate over the weekend the state authorities relied on a California statute (Cal. Penal Code Ann. § 825 (West 1985)) that provided for a first appearance as late as 48 hours after arrest, excluding holidays and Sundays.[11] Pet. App. 57a. The automatic exclusion of holidays and Sundays was rejected by the Court in *McLaughlin*, 111 S. Ct. at 1671, but that occurred nearly three years after the state officers relied on that provision of California law in this case. This Court's decision in *Illinois* v. *Krull*, 480 U.S. 340, 349-355 (1987), which held that the exclusionary rule is inapplicable when officers rely in good faith on a statute that is later declared unconstitutional, therefore would preclude respondent from obtaining suppression of evidence in these circumstances, even if the Fourth Amendment was violated, and even if respondent had preserved the claim.

Respondent argues at length (Br. 43-49) that the state officers should have known that the California statute was unconstitutional, and that their "reckless disregard" of Fourth Amendment rights bars application of the good faith exception. But that argument is inconsistent with respondent's separate contention that *McLaughlin* effected such a sharp change in the law that *he* was justified in never having raised any Fourth

[11] At the time of respondent's arrest, California law provided that "[m]unicipal and justice courts shall not be open for the transaction of business on Saturday, which is a holiday as respects the transaction of business in municipal and justice courts." Cal. Gov't Code § 71,345 (West Supp. 1977) (repealed by 1986 Cal. Stat. 500, ch. 1398, § 5, effective Jan. 1, 1989).

Amendment claim before he arrived in this Court. In any event, this Court's cases prior to *McLaughlin* gave law enforcement officers good reason to believe in good faith that the delay that occurred here would not contravene the Fourth Amendment.

Gerstein contemplated that States would be permitted to delay the probable cause determination required by the Fourth Amendment in order to consolidate that determination with a defendant's first appearance, such as the appearance contemplated by Cal. Penal Code Ann. § 825 (West 1985), and it cited with approval a model code that provided for a probable cause determination within two "court days" of the arrest—*i.e.*, five days in the event of intervening holiday weekends. See *Gerstein*, 420 U.S. at 123-124 & n.25. And, in *Schali* v. *Martin*, 467 U.S. 253 (1984), the Court rejected a *Gerstein* challenge to a New York statute that authorized preventive detention of juveniles, and which usually provided a probable cause determination four days after arrest. *Schall* v. *Martin*, 467 U.S. at 276-277 & n.27. Noting that "*Gerstein* indicated approval of pretrial detention procedures that supplied a probable-cause hearing within five days of the initial detention," *id.* at 277 n.28, the Court found no constitutional infirmity in the New York procedures. In view of the views expressed by *Gerstein* and *Schall*, there is no force to respondent's claim that in August 1988 any reasonable officer should have known that respondent's detention violated the Fourth Amendment.[12]

[12] Respondent also contends (Br. 41-43) that a good faith exception should not be applied in this context because the California statute, unlike the statute at issue in *Krull*, permitted but did not require the officers' conduct. That contention, however, would apply equally well to bar application of the good faith exception to

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JANUARY 1994

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search warrants (which authorize but do not usually *require* searches), which is the very context in which the good faith doctrine was originally developed. See *United States* v. *Leon*, 468 U.S. 897 (1984).

Finally, respondent also contends (Br. 40-41) that the good faith doctrine is inapplicable here because the state officers violated the statute by failing to present him to a magistrate "without unnecessary delay." The essence of that contention is respondent's claim, rejected by the district court, that the delay here was unreasonable because it was for the purpose of interrogation. Indeed, respondent erroneously implies that the state prosecutor had already declined prosecution before the delay. The only reference in the record to that prosecutor's action indicates that he declined to prosecute on Monday, August 8, 1988 (Pet. App. 54a), after the weekend delay at issue here.

APPENDIX

STATE OF CALIFORNIA - COUNTY OF LOS ANGELES
SEARCH WARRANT AND AFFIDAVIT
(AFFIDAVIT)

John McCann, being sworn, says that on the basis of the information contained within this Search Warrant and Affidavit and the attached and incorporated Statement of Probable Cause, he/she has probable cause to believe and does believe that the property described below is lawfully seizable pursuant to Penal Code Section 1524, as indicated below, and is now located at the locations set forth below. Wherefore, affiant requests that this Search Warrant be issued.

/s/ John McCann, NIGHT SEARCH REQUESTED: YES[ ] NO [X]

(SEARCH WARRANT)

THE PEOPLE OF THE STATE OF CALIFORNIA TO ANY SHERIFF, POLICEMAN OR PEACE OFFICER IN THE COUNTY OF LOS ANGELES:

proof by affidavit having being made before me by *John McCann* that there is probable cause to believe that the property described herein may be found at the locations set forth herein and that it is lawfully seizable pursuant to Penal Code Section 1524 as indicated below by "x" (s) in that it:

____was stolen or embezzled

X was used as the means of committing a felony

X is possessed by a person with the intent to use it as means of committing a public offense or

is possessed by another to whom he or she may have delivered it for the purpose of concealing it or preventing its discovery.

__X__ tends to show that a felony has been committed or that a particular person has committed a felony.

____ tends to show that sexual exploitation of a child, in violation of P.C. Section 311.3 has occurred or is occurring.

YOU ARE THEREFORE COMMANDED TO SEARCH:

The residence located at 3025 Frazier Av. Apt. D in the City of Baldwin Park and County of Los Angeles. 3025 Frazier Apt. D is a one story apt. located at the rear and attached to a brown stucco one[-]story building. Apt D has a brown wood front door which faces South. The letter D is on the front of the door. Apt. D is on the northside of the walkway. The number 3025 [is] on the front portion of the building. Also any and all storage areas located there or associated with 3025 Frazier Av. Apt D.

Also the person of J/D Pedro with a possible last name of Alverez and an aka of "Tejano" described as a male Mexican approx. 40 years old, 5'6" tall and 140 to 160 lbs. with black hair[,] somewhat balding, a mustache and missing the first portion of his index finger.

Also the person of J/D Ceasar described as a male Mexican approx. 28 years old, 5'8" tall, a medium build and medium complexion, black hair, mustache and tattoos on his arms.

Also the person of J/D Terry with a possible last name of Lovato described as female Mexican about 28 years old, 5'6" tall, a light complexion, medium build and large nose.

Also any and all vehicles parked at 3025 Frazier Ave. which are under control of the occupants of 3025 Frazier Av.

FOR THE FOLLOWING PROPERTY: Heroin and narcotic[s] paraphernalia, consisting in part of, and including, but not limited to, hypodermic needles, hypodermic syringes, eye droppers, spoons, cotton, milk[,] sugar, scales and other weighing and measuring devices, and other containers of various types that are commonly associated with the storage and use of heroin, consisting in part of, but not limited to balloons, condoms, paper bindles, foil bindles, capsules; and articles of personal property that tend to establish and document the sales of heroin, consis[ting] in part, and including, but not limited to, U.S. currency, buyer lists, seller lists, ledgers and articles of personal property that tend to establish a conspiracy to sell heroin, that consist in part of and including, but not limited to, personal telephone books, telephone bills, utility bills, papers and documents that contain lists of names that tend to establish the identity of persons in control of the premises, and rent receipts, cancelled mail envelopes and keys, and all incoming telephone calls that tend to prove conspiracy to commit sales of heroin.

AND TO SEIZE IT IF FOUND and bring it forthwith before me, or this court, at the courthouse of this court. This Search Warrant and incorporated affidavit was sworn to and subscribed before me this 5th day of August, 1988 at 2:06 p.m. Wherefore I find probable cause for the issuance of the warrant and do issue it.

/s/ [illegible]. NIGHT SEARCH APPROVED: YES [] NO []

Attachment 1

Observations Of Affiant

Your affiant[,] a deputy sheriff employed by the County of Los Angeles[,] states that he has been a peace officer for 23 years and that his present assignment is NORSAT[,] a crime suppression unit.

During the first week of Aug 1988 your affiant was contacted by an inf. your affiant knows to be reliable[.] See attachment 2. During the first week of Aug 1988 this inf., inf. 1 advised your affiant that he/she has been buying grams of heroin from a friend who obtains the heroin from the rearmost apt. on the northside of the apt. complex located at 3025 Frazier in the city of Baldwin Park. Inf. 1 advised your affiant that on approx ten occasions he/she has gone with the friend to buy heroin from the apt. complex at 3025 Frazier, and that this occurred during the month of Juiy 1988 and the first week of Aug.1988. Inf. 1 further advised your affiant that on each occasion he/she went to the apt. complex at 3025 Frazier with the friend to buy heroin he/she would give the friend the money for the heroin and he/she would observe the friend walk to and enter the rearmost apt. on the northside of the complex, and return moments later after exiting said apt.[,] at which time the friend would give inf. 1 the amount of heroin purchased. Inf. 1 indicated that the last time he/she purchased or obtained heroin from the friend via the rear northside apt. was within a three day period just prior to 8-5-88. Inf. 1 also stated that on the approx ten occasions he/she has gone to the complex at 3025 Frazier he/she has obtained heroin each time. Inf. 1 stated that the friend advised that the person who is selling the

heroin from the apt. complex at 3025 Frazier is named "Tajano."

During the first week of Aug 88 inf. 1 directed your affiant to and pointed out the complex at 3025 Frazier indicating to your affiant that the friend buys the heroin from the northside rear apt. at said complex.

During the first week of Aug 88 your affiant was advised by inf. 2 that a person known as Tajano or Pedro was selling heroin from the apt. complex located at 3025 Frazier. On 8-4-88 inf. 2 directed your affiant to and pointed out the complex at 3025 Frazier[,] Baldwin Park[,] advising your affiant that "Tajano" sells heroin from the rearmost apt. on the northside of the walkway. Inf. 2 further advised your affiant that a male named Cesar and a female named Terry also live in said apt. and that Cesar at times delivered heroin for "Tajano." Inf. 2 stated that Tajano is a male Mexican about 40 years old, 5'-6" tall, 140 to 160 lbs. with dark hair[,] somewhat balding[,] a mustache[,] and missing a portion of his right index finger. Inf. 2 described Cesar as a male Mexican about 28 years old, 5'-8" tall[,] a medium build with black hair[,] a mustache[,] and tattoos on his arms. Inf. 2 stated that he/she had purchased both heroin and cocaine form Tajano and Ceasar at the indicated apt. within the complex at 3025 Frazier. However, the last time he/she (inf. 2) purchased a heroin or cocaine from said apt. was approx. tiiree weeks prior to 8-4-88. On 8-4-88 your affiant observed a male exit the rear northside apt. at 3025 Frazier. Inf. 2 advised your affiant that this male was Ceasar. On 8-4-88 inf. 2 advised your affiant that he/she has purchased heroin from "Tajano" or Caesar at said apt. on at least five occasions and has never known them to be void of heroin. Inf. 2 further stated that he/she knows the female Terry to be a heroin user having observed Terry in-

ject heroin at the indicated apt. Inf. 2 described Terry as female about 28 years old 5'-6" tall, with a medium build a light complexion and big nose and a possible last name of Lavato.

Your affiant has been a narcotics investigator for 12 years and has conducted in excess of 1,000 narcotics investigation[s]. Your affiant has testified in both Los Angeles County Superior and Municipal on numerous occasions as an expert witness re: heroin usage and puncture wounds caused by the injection of heroin.

Your affiant knows both inf. 1 and 2 to be heroin users as evidenced by puncture wounds observed on their arms over their veins which in your affiant's opinion are caused by the injection of heroin. Both inf. 1 and 2 have advised your affiant that on each occasion when they have obtained heroin from Tajano, Ceasar, or the friend of inf. 1 they have used a portion of said heroin and it has caused them to attain a lethargic condition. On 8-4-88 your affiant's partner[,] Officer Aquino[,] walked into the complex at 3025 Frazier and observed the rear northside apt. to be Apt. D. Said complex is a one story light brown stucco building. Apt. D has a brown wood front door. On 8-4-88 inf. 2 advised your affiant that "Tajano's" (aka Pedro) phone number is 818-338-0411 and that he/she has called him on several occasions at said number. On 8-5-88 your affiant contacted the local utility company and ascertained that the utility subscriber at 3025 Frazier Baldwin Park Apt. D is a Mary L. Perez[,] who listed her husband as Pedro Alverez and the home phone number as 818-338-0411.

Due to the information contained in this affidavit, your affiant is of the opinion that "Tajano" aka Pedro, Ceasar and Terry are residing at 3025 Frazier Apt.

D[,] Baldwin Park[,] where they keep and sell heroin from on a daily basis.

Your affiant knows that inf. 1 and inf. 2 are acting independent of each other re: their furnishing of this information contained in this affidavit.

Attachment 2

Reliable Informant

Your affiant wishes to keep inf. 1 and 2 identity confidential at this time because both inf. 1 and 2 have requested to remain confidential and further both have indicated that they will continue to furnish information about other law violators.

Your affiant knows inf. 1 to be reliable. During July 1988 inf. 1 furnished your affiant with information that caused the arrest of Michael Pickard for robbery. A criminal complaint has been filed on Pickard in [illegible] Muni Court charging one count 211 P.C. Again during July 1988 inf. 1 furnished your affiant with information which caused your affiant to obtain an arrest warrant for Ronnie Thornburg in Pasadena Court charging burglary[,] case number A577225. During 1987 inf. 1 furnished your affiant with information that caused the arrest of two persons for possession of heroin for sale, 96 balloons of heroin were recovered. This case was filed in [illegible] M/C Court case number A886588.